

## REMARKS

### Introduction

The Final Office Action of January 1, 2006 rejected all of pending claims 3-21. Applicants respectfully traverse the rejections, and in light of the following arguments, request that they be withdrawn.

### Rejection under 35 U.S.C. § 102

The Office Action rejected the present claims 3-21 under 35 U.S.C. § 102(e) as anticipated by WO 00/51895 to Prevot (hereinafter "WO Prevot"). Applicants respectfully disagree with the Examiner's assertion that the old version of 35 U.S.C. § 102(e) applies to this application. The Examiner is directed to the footnote to 35 U.S.C. § 102(e), which states that the current version of 35 U.S.C. § 102(e) applies to all patent applications pending on or filed after November 29, 2000. Additionally, Applicants submit that WO Prevot is not a 35 U.S.C. § 102(e) reference regardless of which version of the statute applies.

Applicants traverse the rejection, and further submit that Prevot does not qualify as prior art under the statute. WO Prevot has an international filing date of February 29, 2000. As set forth in the MPEP, § 706.02(f)(1), Example 6, "application publications, both the WIPO publication and the U.S. publication, published from an international application that was filed prior to November 29, 2000, do not have any 35 U.S.C. 102(e) prior art date." The section continues, "If the international application properly claimed priority/benefit to any earlier-filed U.S. application (whether provisional or non-provisional), there would still be no 35 U.S.C. 102(e)(1) date for the U.S. and WIPO application publications . . . ." (Id.) Withdrawal of the rejection is respectfully requested.

### Rejection under 35 U.S.C. § 103

The Office Action also rejected present claims 3-21 as unpatentable over U.S. 5,887,739 to Prevot (hereinafter "US Prevot") in view of U.S. 5,908,128 to Krishnakumar (hereinafter "Krishnakumar"). Applicants respectfully traverse the rejection.

The Office Action admits that neither Prevot nor Krishnakumar disclose all the elements of Applicant's claims, but asserts that "it would have been obvious . . . to provide Prevot with vertical grooves and a footed base as well as the crystallinity as taught by Krishnakumar to withstand pasteurization with a plastic container." (Office Action, page 3, paragraph 4.) Applicants submit that the Office Action fails to set forth a prima facie case for obviousness.

Three requirements must be met in order to satisfy a prima facie case for obviousness: 1) there must be some suggestion or motivation to combine the references; 2) there must be a reasonable expectation of success; and 3) the combination must teach all the claimed limitations. The teaching or suggestion to make the claimed combination must be found in the prior art, not in applicant's disclosure. (MPEP, § 2143, citing *In re Vaeck*, 947 F.2d 488, 20 USPQ 2d 1438 (Fed. Cir. 1991). At most, US Prevot discloses a dome for a wide-mouth plastic container that can withstand pressure from top loading without distortion. US Prevot, at most, discloses that the dome can be suitable for hot fill processing. However, there is no teaching to other aspects of a container, such as a sidewall or base.

Krishnakumar discloses a non-wide-mouth container that is claimed to be suitable to pasteurization, having hoop ribs in land areas above and below the panels and in the upper section of the container. There is nothing in the references themselves that teaches the combination of US Prevot and Krishnakumar, nor would one of ordinary skill in the art be motivated to combine a reference directed to a wide-mouth container dome with an increased top load capacity, with a

reference directed to a non wide-mouth, pasteurizable container. It is respectfully submitted that the Action is using Applicant's disclosure as the source of motivation for the combination, and that this use amounts to an impermissible hindsight bias. "Determination of obviousness cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention." See *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). As the Action fails to satisfy the first of the requirements for a case of prima facie obviousness, it is submitted that the rejection is improper.

Even if one of skill in the art were to combine the references, there is no reasonable expectation of success. Specifically, the body specifications of Krishnakumar, directed to a non-wide-mouth container, would not be expected to work with the dome of US Prevot. There is no reason to expect that the body or base of Krishnakumar would be sturdy enough to support the dome of Prevot, particularly when containers are stacked upon each other. Similarly, a skilled artisan would not expect that the dome of US Prevot, in conjunction with the body and base of Krishnakumar, would be able to withstand the pressures of pasteurization, as pasteurizable containers must be able to withstand temperatures that exceed the temperatures of hot-fill processing. The Office Action fails to meet the second requirement for a prima facie case of obviousness, and the rejection should be withdrawn.

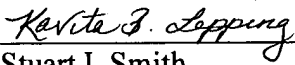
The Office Action fails to satisfy a prima facie case for obviousness because the Action does not meet at least the first two requirements as set forth in the MPEP. Accordingly, the rejection under 35 U.S.C. is improper and withdrawal is respectfully requested.

Summary

All of the stated grounds of objection and rejection have been properly traversed, accommodated, or rendered moot. Applicants therefore respectfully request that the Examiner reconsider all presently outstanding objections and rejections and that they be withdrawn. Applicants believe that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. Accordingly, Applicants request that the Examiner issue a Notice of Allowance indicating the allowability of claims 3-21 and that the application be passed to issue. If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is hereby invited to telephone the undersigned at the number provided.

Respectfully submitted,

March 13, 2006

  
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SIS/KBL 732150